

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

**\*\* FILED \*\***  
27JUN2017 - 09:16AM  
U.S.EPA - Region 09

IN THE MATTER OF

**American Biodiesel, Inc.,  
dba Community Fuels,  
a California Corporation,  
Port of Stockton, CA,**

Respondent.

**CWA SECTION 311 CLASS I  
CONSENT AGREEMENT  
AND FINAL ORDER**

Docket No. **OPA-09-2017-0005**

**CONSENT AGREEMENT**

**Preliminary Statements**

1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Sections 311(b)(6)(A) and (B)(i) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1321(b)(6)(A), and (B)(i), as amended by the Oil Pollution Act of 1990, and under the authority provided by 40 CFR § 22.18(b)(2). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IX, Delegation 2-29 (April 16, 1984), who has in turn delegated them to the Director of the Enforcement Division (“Complainant”), Delegation R9-2-52-A (February 11, 2013).

2. Complainant initiates this proceeding against American Biodiesel, Inc., doing business as Community Fuels (“Respondent”) for alleged violations of Section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations, at Respondent’s facility located at 809-C Snedeker Avenue, Stockton, California (the “Facility”). Complainant and Respondent are

hereinafter collectively referred to as the “Parties.”

3. This CAFO simultaneously commences and concludes this penalty proceeding, as authorized by 40 CFR § 22.13(b).

4. The Parties agree that settlement of this matter is consistent with the Act’s objectives, in the public interest, and the most appropriate means of resolving this matter.

#### **General Provisions**

5. EPA has jurisdiction over the subject matter of this action. The Consent Agreement contains the elements of a complaint required by 40 CFR §§ 22.14(a)(1)-(4), (7)-(8).

6. For purposes of this proceeding, Respondent admits the jurisdictional allegations herein and agrees not to contest EPA’s jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this CAFO.

7. Respondent neither admits nor denies the factual allegations set forth herein.

8. Respondent agrees not to contest the terms and conditions set forth in this CAFO in this or subsequent proceedings, and agrees not to appeal the Final Order set forth below.

9. Respondent explicitly waives its right to a hearing on any issue of fact or law set forth herein.

10. This CAFO is the entire agreement between the Parties to resolve EPA’s civil penalty claim against Respondent for the specific CWA violations alleged herein. Full compliance with this CAFO shall constitute full settlement only of Respondent’s federal civil penalty liability for the CWA violations specifically alleged herein.

11. This CAFO does not constitute a waiver, suspension or modification of the requirements of Section 311 of the Act, 33 U.S.C. § 1321, or any regulations promulgated thereunder, and does not affect the right of the Administrator or the United States to pursue any applicable injunctive or other equitable relief or criminal sanctions for any violation of law. Payment of the penalty pursuant to this CAFO resolves only Respondent's civil liability for the violations and facts alleged in this CAFO.

12. Respondent certifies by signing this CAFO that, to the best of its knowledge, as of the Effective Date of this CAFO, it is in compliance with the requirements of Section 311(j) of the Act, 33 U.S.C. § 1321(j), at the Facility. As of the date of Respondent's signature on this CAFO, Respondent is working on the following items: (1) amending and recertifying its SPCC plan within 30 days of the effective date of this CAFO; (2) conducting tank integrity testing within five months of the effective date of this CAFO; (3) amending its FRP within 90 days of the effective date of this CAFO, which will include a schedule to complete all quarterly, semi-annual and annual drills.

13. Except as set forth in Paragraph 38, the Parties agree to bear their own costs and attorneys' fees.

14. This CAFO shall in no way affect the right of EPA or the United States against any third party or the right of any third party against Respondent. This CAFO does not create any right in or grant any cause of action to any third party.

15. This CAFO shall apply to and be binding upon Respondent, successors, and assigns. Changes in ownership, including but not limited to any transfer of assets or real or personal property, shall not alter Respondent's obligations under this CAFO.

16. The CAFO may be executed and transmitted by facsimile, email or other electronic means, and in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument. If any portion of this CAFO is determined to be unenforceable by a competent court or tribunal, it is the Parties' intent that the remaining portions shall remain in full force and effect.

17. Each signatory to this CAFO certifies he or she is fully authorized to enter into and bind the party for whom it is signing to the terms of the CAFO.

#### **Statutory and Regulatory Framework**

18. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore facilities . . . and to contain such discharges . . . ."

19. Initially by Executive Order 11548 (July 20, 1970), 35 Fed. Reg. 11677 (July 22, 1970), and most recently by Section 2(b)(1) of Executive Order 12777 (October 18, 1991), 56 Fed. Reg. 54757 (October 22, 1991), the President delegated to EPA his Section 311(j)(1)(C) authority to issue the regulations referenced in the preceding Paragraph for non-transportation-related onshore facilities.

20. EPA subsequently promulgated regulations, codified at 40 CFR Part 112 (the “Oil Pollution Prevention regulations”) pursuant to these delegated statutory authorities and pursuant to its authorities under the CWA, 33 U.S.C. § 1251 *et seq.*, which set forth certain procedures, methods and requirements, including requirements for Spill Prevention, Countermeasure and Control (“SPCC”) planning, applicable to an owner or operator of an onshore facility, which, due to its location, reasonably could be expected to discharge oil into or on navigable waters and their adjoining shorelines in such quantities as EPA has determined in 40 CFR Part 110 may be harmful to the public health or welfare or the environment of the United States.

21. “Navigable waters” are defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 CFR § 112.2.

22. In promulgating 40 CFR § 110.3, which implements Section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), EPA has determined that the quantities of oil that may be harmful to the public health or welfare or the environment of the United States include discharges of oil that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

### **General Allegations**

23. At the time of an EPA inspection conducted on September 21, 2016, Respondent was the “owner or operator” within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), of the Facility.

24. American Biodiesel, Inc., doing business as Community Fuels, is a corporation organized under the laws of California, with a place of business located at 171 Saxony Road, Suite 202, Encinitas, CA 92024, whose mailing address is PO Box 23-4249, Encinitas, CA 92023. Respondent is a “person” within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 CFR § 112.2.

25. The Facility is “non-transportation-related” within the meaning of 40 CFR § 112.2.

26. The Facility is an “onshore facility” within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 CFR § 112.2.

27. Respondent, at the time of EPA’s April 8, 2015 inspection, was engaged in the production of biomass-based diesel fuel which is then sold in bulk to the petroleum industry to be blended with petroleum diesel.

28. The Facility had, at the time of inspection, several above-ground oil storage tanks and process vessels with a combined oil storage capacity of approximately 1,050,000 gallons.

29. The Facility is in close proximity to “navigable waters” of the United States within the meaning of Section 502(7) of the Act, U.S.C. § 1362(7) and 40 CFR § 112.2; specifically, the Facility is located in Stockton, on Rough and Ready Island, adjacent to the San Joaquin River, which flows into the Sacramento River, which flows into Suisun Bay, which flows into San Pablo Bay, which flows into the Pacific Ocean.

30. The Facility is a non-transportation-related facility that, due to its location, could

reasonably have been expected, at the time of inspection, to discharge oil from an above-ground container to a navigable water of the United States or its adjoining shorelines in a harmful quantity, and is therefore subject to the Oil Pollution Prevention regulations at 40 CFR Part 112.

31. EPA alleges that Respondent failed to comply with applicable requirements of 40 CFR Part 112, including:

a. failing to amend and recertify the SPCC plan not later than six months following a change in the facility design, construction, operation or maintenance that materially affects the potential for discharge (i.e., the addition of three 250,000-gallon biodiesel storage tanks in July 2015), in violation of 40 CFR § 112.5;

b. failing to maintain and implement an SPCC plan that includes appropriate containment and or diversionary structures or equipment to prevent a discharge (SPCC plan had no discussion of the Facility's drainage control systems, general containment requirements, and use of the inflatable ball-valve systems to plug drainage piping; also the ball-valves observed in use at certain locations may not adequately control drainage under increased hydraulic pressure), in violation of 40 CFR § 112.7(c);

c. failing to maintain an SPCC plan that includes secondary containment, prevention of premature vehicle departure and inspection of lower-most drains/outlets on trucks for the truck loading/unloading rack, in violation of 40 CFR § 112.7(h);

d. failing to maintain and implement an SPCC plan that provides adequate detail on applicable Tank Integrity testing program and inspector qualifications according to applicable

industry standards, in violation of 40 CFR § 112.12(c)(6);

e. failing to maintain and implement an SPCC plan that describes fail-safe engineering controls to prevent overfilling of containers and associated testing and maintenance of such controls to check liquid levels, in violation of 40 CFR § 112.12(c)(8);

f. failing to position or locate mobile or portable oil storage containers within adequate sized secondary containment systems, including the drums and totes of diesel, to prevent a discharge from escaping the facility, in violation of 40 CFR § 112.8(c)(11); and

g. failing to develop and implement a Facility Response Plan following the installation and start-up of three 250,000-gallon biodiesel storage tanks that resulted in the Facility's total storage capacity being greater than 1,000,000 gallons, in violation of 40 CFR § 112.20.

### **Penalty**

32. Section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per violation, up to a maximum penalty of \$25,000. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 CFR Part 19, the administrative assessment of civil penalties may not exceed \$18,107 per day for each day during which the violation continues, up to a maximum Class I civil penalty of \$45,268. *See also* 82 Fed. Reg. 3636 (January 12, 2017).

33. Respondent consents to the assessment of and agrees to pay a civil penalty of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500) in full settlement of the federal



civil penalty claims set forth in this CAFO. The penalty was calculated based on the nature, circumstances, extent and gravity of the violations, Respondent's ability to pay, its prior history of violations, its degree of culpability, and any economic benefit or savings accruing to Respondent as a result of the violations.

### **Payment Terms**

34. Respondent shall submit payment of the SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00) within thirty (30) days of the Effective Date as specified in Paragraph 54 of this CAFO.

35. Respondent shall make required payments by cashier's check, certified check or electronic funds transfer ("EFT") payable to the "U.S. Environmental Protection Agency," with the notation "OSLTF - 311" and the docket number of this CAFO. Payment by check shall be addressed to:

U.S. Environmental Protection Agency  
Fines and Penalties, Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000

If paying by EFT, the Respondent shall transfer the payment to:

Federal Reserve Bank of NY  
ABA 021030004  
Account 68010727  
33 Liberty Street  
New York, N.Y. 10045

Field Tag 4200 of the EFT message shall read “D 68010727 Environmental Protection Agency.”

36. **Notification.** Within thirty (30) days after the due date of the payment, a copy of each check, or notification that the payment has been made by one of the other methods listed above, including proof of the date payment was made, shall be sent with a transmittal letter, indicating Respondent’s name, the case title, and docket number, to each of the following:

Steven Armsey  
Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region 9  
75 Hawthorne Street (ORC-1)  
San Francisco, California 94105

and to:

Peter Reich  
U.S. Environmental Protection Agency Region 9  
75 Hawthorne Street (ENF-3-2)  
San Francisco, California 94105

37. If payment is not received by the due date, interest on any overdue amount will accrue from the Effective Date of this CAFO at the current rate published by the United States Treasury as described at 40 CFR § 13.11. In addition, a twelve percent (12%) per annum penalty will be applied on any principal amount not paid within ninety (90) days of the due date. Payment of any interest shall be made in accordance with Paragraphs 35 and 36, above.

38. Respondent’s failure to make timely payment in full within the time provided in Paragraph 34 may subject Respondent to a civil action to collect the assessed penalties, plus interest, attorneys’ fees, costs and additional quarterly nonpayment penalties pursuant to Section

311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H). In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

39. The civil penalty and any interest, late handling fees, or late penalty payments provided for in the CAFO shall not be deducted from Respondent's or any other person or entity's federal, state, or local taxes.

**Delay in Performance/Stipulated Penalties**

40. In the event Respondent fails to meet any requirement set forth in this CAFO, Respondent shall pay stipulated penalties as set forth below. Compliance by Respondent shall include completion of any activity under this CAFO in a manner acceptable to EPA and within the time specified in and approved under this CAFO.

41. For failure to submit a payment to EPA by the time required in this CAFO: FIVE HUNDRED DOLLARS (\$500) per day for the first to the fifteenth day of delay, ONE THOUSAND DOLLARS (\$1,000) per day for the sixteenth to the thirtieth day of delay, and THREE THOUSAND DOLLARS (\$3,000) per day for each day of delay thereafter.

42. Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day until performance is complete. Respondent shall pay stipulated penalties within fifteen (15) days of receipt of a written demand by Complainant for such penalties. Payment of stipulated penalties shall be made in accordance with the unpaid balance at the end of the fifteen-day period with interest at the current rate published by the

United States Treasury, as described at 40 CFR § 13.11. Complainant reserves the right to take any additional action, including but not limited to, imposition of civil penalties to enforce compliance with this CAFO.

43. The payment of stipulated penalties specified in this Section shall not be deducted by Respondent or any other person or entity for federal, state, or local taxation purposes.

44. Notwithstanding any other provision of this section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this CAFO.

#### **Reservation of Rights**

45. Except as addressed in this CAFO, EPA expressly reserves all rights and defenses that it may have.

46. Except as addressed by this CAFO, EPA hereby reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, including any right EPA may have to require that Respondent perform tasks in addition to those required by this CAFO. EPA further reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, which may pertain to Respondent's failure to comply with any of the requirements of this CAFO, including, without limitation, the assessment of penalties under Section 311(b) of the CWA, 33 U.S.C. § 1321(b). This CAFO shall not be construed as a covenant not to sue, a release, waiver or limitation of any rights, remedies, powers, or

authorities, civil or criminal, which EPA has under the CWA, or any other statutory, regulatory, or common law enforcement authority of the United States, except as otherwise set forth herein.

47. Compliance by Respondent with the terms of this CAFO shall not relieve Respondent of its obligations to comply with any applicable local, state or federal laws and regulations.

48. The entry of this CAFO and Respondent's consent to comply shall not limit or otherwise preclude EPA from taking, nor limit or otherwise preclude Respondent from asserting rights and defenses in additional enforcement actions should EPA determine that such actions are warranted except as they relate to Respondent's liability for federal civil penalties for the specific alleged violations and facts as set forth in Section D of this CAFO. Full payment of the penalty proposed herein shall resolve Respondent's liability for federal civil penalties for the violations and facts alleged herein.

49. Except in an action to enforce this CAFO, Respondent expressly reserves all rights to assert that neither this CAFO nor anything in this CAFO shall be admissible in any proceeding as evidence of an admission by, or to prove the liability of Respondent for the allegations stated herein.

#### **Miscellaneous**

50. This CAFO may be amended or modified only by written agreement executed by both EPA and Respondent.

51. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

52. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.

53. EPA and Respondent consent to entry of this CAFO without further notice.

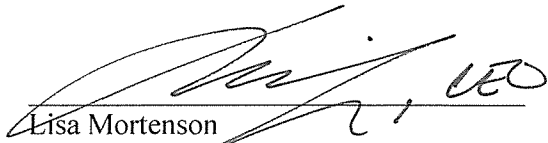
#### **Effective and Termination Dates**

54. In accordance with 40 CFR §§ 22.18(b)(3) and 22.13(b), this CAFO shall take effect on the date the Final Order contained in this CAFO, having been approved and issued by the Regional Judicial Officer, is filed with the Regional Hearing Clerk, and shall terminate when Respondent has fully complied with its terms.

*In the Matter of American Biodiesel, Inc., dba Community Fuels  
Stockton, California*


IT IS SO AGREED,

**For Respondent:**

  
\_\_\_\_\_  
Lisa Mortenson  
Chief Executive Officer  
American Biodiesel, Inc. dba Community Fuels  
PO Box 23-4249  
Encinitas, CA 92023

Date: 5/23/2017

**For Complainant U.S. Environmental Protection Agency:**

*for*   
\_\_\_\_\_  
Kathleen H. Johnson  
Director, Enforcement Division  
U.S. Environmental Protection Agency Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Date: 6/21/2017

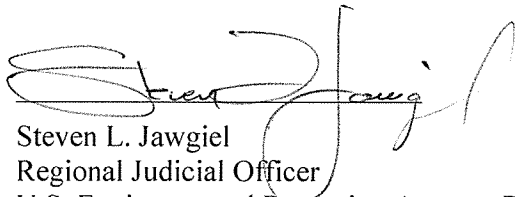
*In the Matter of American Biodiesel, Inc., dba Community Fuels  
Stockton, California*

**FINAL ORDER**

Pursuant to Section 311(b)(6) of the Act, 33 U.S.C. §1321(b)(6) and the delegated authority of the undersigned, and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits,” codified at 40 CFR Part 22, the foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order.

The Respondent is ordered to comply with the terms of the Consent Agreement. In accordance with 40 CFR § 22.31(b), this order shall become effective upon filing, and shall constitute a full adjudication of the allegations stated in the Consent Agreement.

Date: 06/26/17



Steven L. Jawgiel  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105



**CERTIFICATE OF SERVICE**

Docket No. OPA-09-2017-0005

I hereby certify that the original copy of the foregoing CA/FO with the Docket numbers referenced above, has been filed with the Region 9 Hearing Clerk and that a copy was sent by certified mail, return receipt requested, to:

Lisa Mortenson, CEO  
American Biodiesel, Inc., dba Community Fuels  
P.O. Box 23-4249  
Encinitas, CA 92023

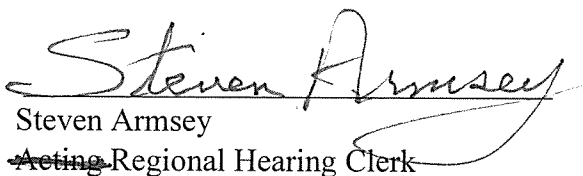
Certified Mail Number: 7016 1370 0000 0748 5872

An additional copy was delivered to the following U.S. EPA case attorney:

Rebekah Reynolds  
Office of Regional Counsel  
U.S. EPA, Region IX  
75 Hawthorne St., ORC-1  
San Francisco, CA 94105

June 27, 2017

Date



Steven Armsey

~~Acting~~ Regional Hearing Clerk

U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105